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Supreme Court, U.S.
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No. 93-1587

In The
Supreme Court of the United States
October Term, 1993

ANN B. LOVELL, et al.,
Petitioners,

v.

PEOPLES HERITAGE SAVINGS BANK, et al.,
Respondents.

ANN B. LOVELL, et al.,
Petitioners,

v.

THE ONE BANCORP, et al.,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION

MICHAEL E. CARPENTER
Attorney General

THOMAS D. WARREN
Assistant Attorney General
(Counsel of Record)
State House Station 6
Augusta, Maine 04333
(207) 626-8800

Attorneys for Respondent
H. Donald DeMatteis

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Questions Presented

1. Whether the depositors of two Maine mutual savings banks were deprived of any constitutionally protected property interest when those banks converted to stock form under Maine law.

2. Whether the procedures followed in the conversion violated due process.

3. Whether the conversion resulted in an unconstitutional taking of the depositors' property.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent H. Donald DeMatteis, Superintendent of the Maine Bureau of Banking, respectfully requests that the Court deny the petition for a writ of

certiorari seeking review of the First Circuit's decision in the above-captioned case.

STATEMENT OF THE CASE

Superintendent DeMatteis does not agree with either the facts or the discussion of Maine law set forth in the Statement of the Case contained in the Petition. With respect to the relevant facts, the Superintendent respectfully refers the Court to the opinions of the district court, Lovell v. The One Bancorp, 818 F. Supp. 412 (D.Me. 1993)(reproduced in the Appendix to the Petition at 5a-34a), and Lovell v. Peoples Heritage Savings Bank, 818 F.Supp. 427 (D.Me. 1993)(reproduced in the Appendix to the Petition at 35a-45a).

With respect to the relevant

provisions of Maine law, the Superintendent respectfully refers the Court to the answers of the Maine Supreme Judicial Court to questions of state law certified by the district court in this case. Lovell v. The One Bancorp, 614 A.2d 56 (Me. 1992).

In particular, the Superintendent takes issue with the following omissions in petitioners' Statement:[1]

1. Petitioners' discussion of Maine law ignores the fact that Maine had statutorily reserved the right to alter and amend corporate charters before the bank charters in question here were issued. As a result, as the Maine Supreme Judicial Court expressly found, the Maine

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[1] Certain other omissions and inaccuracies in petitioners' Statement of the Case have been identified in the Brief filed by respondents Peoples Heritage Savings Bank, Weston Bonney, and Robert Marden, and these will not be reiterated here.

Banking Code -- not the original bank charters -- controlled the depositors' rights upon conversion. Lovell v. The One Bancorp, 614 A.2d at 65.

2. Petitioners' discussion of Maine law also omits to mention that when the statute permitting conversion of mutual savings banks was added to the Maine Banking Code in 1975, it was contemplated that conversions under Maine law would be modeled upon the current Federal Home Loan Bank Board (FHLBB) regulations governing conversions under federal law. See Lovell v. The One Bancorp, 614 A.2d at 58-59, 64. Those FHLBB regulations expressly prohibited any conversion distribution of cash or free stock to depositors and provided that the depositors' contingent interest in the bank's net worth in the event of a solvent liquidation would be

protected by the establishment of a liquidation account.[2]

Consistent with this legislative intent, the Superintendent advised banks to use the FHLBB regulations as guidelines for conversions under Maine Law, and the conversions of Maine Savings Bank in 1984 and Peoples Heritage Savings Bank in 1986 were closely modeled on conversions under the FHLBB regulations. Thus all of the aspects of these conversions that are challenged by petitioners in this case -- including, in particular, the creation of a liquidation account -- were standard features of conversions under federal law.

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[2] Because depositors in a mutual savings bank are not investors in the bank and their funds in the bank are not at risk, the FHLBB regulations expressly stated that any conversion distribution to depositors would constitute an inequitable "windfall." 12 C.F.R. § 563b.3(a)(2) (1983).

3. Petitioners' arguments that the depositors in a mutual savings bank had a reasonable expectation that they possessed an ownership interest in the bank are belied by the deposition testimony of the named plaintiffs below. Both Ann Lovell and Mary Campbell testified in the One Bancorp case that, prior to conversion, they never expected to receive anything more from Maine Savings Bank than the deposits in their accounts plus interest. Not until after the conversion did Mrs. Lovell and Mrs. Campbell come to believe that they had been owners of the bank and were thereby entitled to a distribution of the bank's net worth upon conversion.[3]

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[3] Deposition of Ann Lovell at 36-38; Deposition of Mary Campbell at 43, 57. In Mrs. Campbell's case, she did not come to the belief that she had been an owner of the bank until she spoke with the attorneys representing petitioners (one of whom is her son) after the complaint in Lovell v. The One Bancorp was filed.

4. Although petitioners complain at some length about the adequacy of the notice provided to depositors, they nowhere acknowledge that the courts below expressly rejected their arguments and found that the documents mailed to the depositors of both banks prior to conversion provided the depositors with an adequate notice of the conversion and its effects. See Appendix to the Petition at 3a, 11a, 33a, 40a, 45a. This is fatal to petitioners' procedural due process claim.

REASONS FOR DENYING THE WRIT

This brief will address only the property interest issue and the procedural due process claim. On the other issues raised in the petition, Superintendent

DeMatteis will rely on the opinions of the district court and the First Circuit.

1. Petitioners Are Attempting to Relitigate Issues of State Law

In considering petitioners' claim that the conversions violated the due process and takings clauses of the U.S. Constitution, the initial question is whether a depositor's interest in the net worth of a mutual savings bank qualifies as a constitutionally protected property interest. If not, petitioners' claims fail at the threshold.

It is well-settled that the kind of property interests that are entitled to constitutional protection are not themselves created by the Constitution. Instead, such interests are created and defined by independent sources such as

state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (due process clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (takings clause).[4]

The first step in analyzing whether the depositors had a constitutionally protected property interest, therefore, is to determine the nature of the depositors' interest under Maine law. In this respect, the district court properly sought guidance by certifying questions of state law to the Maine Supreme Judicial Court.

In answering the questions posed by the district court, the Maine Supreme

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[4] At the same time, while property rights are created and defined by state law, the ultimate question of whether an interest created by state law rises to the level of being a property right protected by the takings and due process clauses of the Constitution is a matter of federal law. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978).

Judicial Court considered the same provisions of Maine law which petitioners now repeatedly cite in their Petition for Certiorari -- including the original bank charters, the definition of a mutual financial institution contained in 9-B Me.Rev.Stat.Ann. § 131(27), and the provisions of the conversion statute, 9-B Me.Rev.Stat.Ann.§ 344.

The Maine court nevertheless concluded that while depositors are nominally the owners of a mutual bank, their only actual interest in the bank's net worth consists of a contingent claim to share any residual amount remaining after the payment of creditors in the unlikely event that the bank liquidated while solvent. 614 A.2d at 66-67. In describing this interest, the Maine court quoted approvingly from this Court's

opinion in Society for Savings v. Bowers, 349 U.S. 143, 150 (1955):

> The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposit and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point.

Unhappy with this answer, petitioners now seek to renew in this Court their

various arguments with respect to the nature of their interest under Maine law.[5] The short answer is that certiorari is simply not available to relitigate issues of state law.

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[5] Petitioners appear to contend that they can reargue issues of state law in their petition for certiorari because, in their view, the Maine Supreme Judicial Court "went beyond its limited role in construing Maine law by delving into the federal law issue of whether the state law created interest rose to the level of a protected property interest." (Petition at 5). The problem with plaintiffs' argument is that the Maine Supreme Judicial Court neither ruled nor purported to rule on whether plaintiffs had a constitutionally protected property interest. It left that issue to the district court. The Maine Supreme Judicial simply answered the questions posed by the district court and gave its reasoning for those answers.

2. The Decision Below Is Entirely Consistent with Prior Precedent

Contrary to petitioners' arguments (Petition at 12), the decision in the instant case also does not conflict with prior decisions of this Court.

First, one need look no farther than Society for Savings v. Bowers, 349 U.S. at 150, to conclude that the ruling of the Maine Supreme Judicial Court and the courts below are fully consistent with this Court's prior opinions concerning savings banks. Accord, Paulsen v. Commissioner of Internal Revenue, 469 U.S. 131, 140-41 (1985) (equity portion of depositors' interest is worth practically zero).

Second, the decisions of this Court establish that to be protected by the Constitution, a property interest must be

"more than a unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (due process clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (taking clause). Highly contingent or conditional future interests cannot form the basis for a claim under the taking or due process clauses. E.g., Dames & Moore v. Regan, 453 U.S. 654, 674 n.6 (1981); Chongris v. Board of Appeals, 811 F.2d 36, 43-44 (1st Cir.), cert. denied, 483 U.S. 1021 (1987).

In this case, the district court correctly found that the depositors' inchoate claim to the surplus in the highly unlikely event of a solvent liquidation -- a claim that this Court has described as "a remote contingency," "a possibility that hardly rises to an expectancy," and an interest "whose

theoretical value reduces almost to the vanishing point"-- does not constitute the kind of legitimate expectation that rises to the level of a property interest protected by the Constitution.

This ruling is entirely consistent with the views of the other courts that have considered the nature of the depositors' interest in mutual institutions. Ordower v. Office of Thrift Supervision, 999 F.2d 1183, 1185, 1187 (7th Cir. 1993) (depositors' interest is "a liquidation preference, not a transferable property right"); York v. Federal Home Loan Bank Board, 624 F.2d 495, 500 (4th Cir.), cert. denied, 449 U.S. 1043 (1980) (despite the nominal ownership status of depositors in a savings and loan association, the depositors' "only actual rights" were

"their rights as creditors of the association"); Goldberg v. Philadelphia Savings Fund Society, 9 Phila. 456, 465 (Pa. Ct. of Common Pleas 1983); Washington Federal Savings and Loan Ass'n. v. Federal Home Loan Bank Board, 526 F.Supp. 343, 400 (N.D. Ohio 1981); In re East New York Savings Bank Depositors Litigation, 145 Misc.2d 620, 624, 547 N.Y.Supp.2d 497, 500 (Sup.Ct. N.Y.County 1989), aff'd, 612 App. Div. 251, 559 N.Y.Supp.2d 125 (1st Dept 1990).

There is no conflict on this issue that could conceivably warrant review by this Court.

3. The Conversion Procedure Did Not Violate Due Process

Even assuming that a depositor's possible claim to share in the surplus of

the bank under unlikely future circumstances is not too conjectural and contingent an interest to be entitled to constitutional protection, petitioners' procedural due process claim was properly rejected below and does not warrant review by this Court.

Petitioners argue that at the time the banks' conversion applications were filed, the Superintendent was required to give individual notice by mail to each of the depositors in order to offer them an opportunity to participate before the Superintendent. This argument presumes that the banks' conversion applications were adjudicatory proceedings in which each of the 89,000 Maine Savings depositors and each of the 119,000 Peoples Heritage depositors would have had a right to be heard.

The problems with this argument is that the conversion process was not an adjudicatory proceeding but was rather in the nature of a licensing proceeding. No specific factual disputes were presented by the conversion applications. See Hoffman v. City of Warwick, 909 F.2d 608, 615 (1st Cir. 1990) (due process does not require a hearing where class wide policy determinations are involved); O'Bannon v. Town Court Nursing Home, 447 U.S. 773, 800-01 (1980) (Blackmun, J., concurring) (due process must weigh impracticability of affording individual hearings to large numbers of equally affected persons).

Furthermore, individual notice by mail was in fact given to all account holders to allow them to vote on the conversion before any alleged deprivation of property occurred and at a time when

the state courts were available to correct any errors made by the Superintendent in approving the conversions. Moreover, as noted above, the courts below specifically rejected petitioners' claims that this notice did not adequately apprise depositors of the effects of the conversion. Even assuming that the depositors were somehow deprived of a property interest in the conversion, therefore, the courts below correctly ruled that there was no violation of due process in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

June 6, 1994 Respectfully submitted,

MICHAEL E. CARPENTER
Attorney General

THOMAS D. WARREN
Assistant Attorney General
(Counsel of Record)
State House Station #6
Augusta, Maine 04333
Tel. (207) 626-8800

Attorneys for Respondent
H. Donald DeMatteis,
Superintendent of the
Maine Bureau of Banking